

No. 10-174

IN THE
Supreme Court of the United States

AMERICAN ELECTRIC POWER
COMPANY INC., ET AL.,

Petitioners,

v.

STATE OF CONNECTICUT, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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**COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

1. Whether respondent States and other property-owners may bring a federal-common-law action to abate petitioners' carbon-dioxide emissions, which contribute to a public nuisance, when neither the Clean Air Act itself nor the Environmental Protection Agency currently regulates emissions from existing power plants like petitioners' plants.

2. Whether respondents' allegations that petitioners' carbon-dioxide emissions have contributed to a public nuisance causing tangible injuries to respondents affecting public health, property, and natural resources and that a reduction in the emissions will reduce respondents' injuries are sufficient to establish standing under Article III at this interlocutory stage of the case.

3. Whether respondents' common-law claims can be resolved based on judicially manageable standards without the kinds of policy determinations that would require dismissal of the claims at the outset as non-justiciable political questions.

4. Whether this Court should vacate the decision of the court of appeals and remand for consideration of whether respondents have prudential standing and whether recent regulatory actions have displaced respondents' federal-common-law claims, when the Tennessee Valley Authority has raised those issues for the first time in this Court, and when the court of appeals' remand of the case to the district court already permits such issues to be raised in any event.

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STATEMENT

1. In 2004, respondents—Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin, the City of New York, Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire¹—sued petitioners and the Tennessee Valley Authority (“TVA”) in the United States District Court for the Southern District of New York, alleging that carbon-dioxide emissions from petitioners’ and TVA’s power plants had contributed to global warming, creating a public nuisance under federal and state common law. Respondents alleged that those emissions have caused a wide range of current and threatened injuries, including increased injuries and death due to intensified heat waves and smog, a decreased supply of fresh water as a result of lost snow pack in California, and erosion of publicly and privately owned coastal land as a result of a rise in sea levels. Respondent States sued in two capacities: as *parens patriae*—to protect the health and welfare of their citizens—and as property owners. *See* Pet. App. 54a. The other respondents sued as property owners. *See id.* at 57a. Respondents seek injunctive relief to reduce petitioners’ and TVA’s carbon-dioxide emissions, but not damages.

1. For simplicity’s sake, this brief uses the term “respondents” to refer to the States, City, and land trust property owners (Open Space Institute, Open Space Conservancy, Inc., and Audubon Society of New Hampshire), all of which were plaintiffs in the district court. Although defendant TVA is also technically a respondent, *see* Sup. Ct. R. 12.6, it is aligned with petitioners and supports the petition in part.

2. Petitioners and TVA moved to dismiss respondents' claims but did not raise the political question doctrine as a basis for dismissal. Pet. App. 178a-181a. Indeed, petitioners claimed that the test for political questions in *Baker v. Carr*, 369 U.S. 186, 208-17 (1962), was “wholly irrelevant” to this case.² The district court nonetheless dismissed the case on the ground that the relief sought by respondents—reductions in petitioners' carbon-dioxide emissions—raised non-justiciable political questions that the district court believed would require it to make complex policy determinations that should be made by the legislative and executive branches. Pet. App. 180a-181a, 183a-187a. The district court did not reach any of the other grounds on which petitioners and TVA sought dismissal, including Article III standing and failure to state a claim. *Id.* at 178a-179a, 187a. Neither TVA nor petitioners raised prudential standing in their motions to dismiss.

3. The court of appeals reversed, holding that respondents' public-nuisance claims do not involve political questions because the claims can be decided based on well-settled principles of tort and public-nuisance law and would not require the district court to make policy determinations of a kind clearly for nonjudicial discretion. *Id.* at 17a-41a. The court held further that respondents' allegations were sufficient at the pleading stage to establish standing and to state a public-nuisance claim under federal common law. *Id.* at 41a-76a, 88a-94a. It emphasized that it was making only

2. Reply Memorandum of Law in Further Support of the Motions of the Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corp. to Dismiss for Lack of Personal Jurisdiction, at 10 (December 17, 2004).

a threshold determination as to standing based on the pleadings, and that a greater evidentiary showing would be required as discovery progressed and at summary judgment. *Id.* at 42a-44a. The court also held that respondents' common-law claims had not been displaced, because the Environmental Protection Agency had not exercised its authority under the Clean Air Act to regulate carbon-dioxide emissions from petitioners' and TVA's power plants. *Id.* at 131a-144a. The court remanded the case to the district court, noting that it was not deciding how, if at all, future EPA regulatory actions would affect its displacement analysis. *Id.* at 159a, 169a-170a. The court denied petitions for panel or *en banc* rehearing. *Id.* at 188a-190a.

4. At the time that the court of appeals decided this case in 2009, EPA had not exercised its authority under the Clean Air Act to regulate carbon-dioxide emissions from existing power plants like petitioners' and TVA's plants, nor has it done so as of the date of this filing. But EPA may do so in the near future, as it did earlier this year for certain other sources of carbon-dioxide emissions.

First, in December 2009, EPA issued a finding, in response to *Massachusetts v. EPA*, 549 U.S. 497, 532, 535 (2007), that emissions from motor vehicles of carbon dioxide and other greenhouse gases—*i.e.*, gases that create a greenhouse effect by preventing heat from escaping from the Earth's atmosphere—endanger human health and welfare. 74 Fed. Reg. 66,496, 64,496-99 (Dec. 15, 2009). In March 2010, as a result of that finding, EPA established carbon-dioxide limitations for the first time for light-duty motor vehicles. 75 Fed. Reg.

25,324 (May 7, 2010). Second, in March and May 2010, EPA took two actions under which particularly large stationary sources that are newly constructed or modified will be required to obtain permits that include greenhouse-gas emission limitations beginning in 2011. 42 U.S.C. § 7475; 75 Fed. Reg. 17,004, 17,009 (April 2, 2010); 75 Fed. Reg. 31,514, 31,523-24 (June 3, 2010). Petitioners have filed a series of cases aimed at blocking EPA's greenhouse-gas regulations. *See Utility Air Regulatory Grp. v. EPA*, Nos. 10-1042, 10-1122, 10-1161 (D.C. Cir).

EPA has not yet issued regulations that limit emissions of carbon dioxide and other greenhouse gases from existing stationary sources like petitioners' and TVA's plants. Although those plants will be required to obtain a permit limiting their greenhouse-gas emissions if they undergo a sufficiently large "modification"—the term the Clean Air Act uses to refer to a renovation or expansion project that increases a plant's emissions, 42 U.S.C. § 7411(a)(4)—petitioners acknowledge that "federal law currently imposes no relevant restrictions on their emissions." Pet. 18; *see also* Brief for the Tennessee Valley Authority in Support of Petitioners ("TVA Br.") 31.

But as TVA emphasizes, EPA is actively considering whether to establish performance standards under the Clean Air Act, 42 U.S.C. § 7411. If issued, those standards would directly limit greenhouse-gas emissions from all new and modified power plants under § 7411(b) and set in motion a requirement for the States or EPA to set limits on greenhouse-gas emissions from existing power plants, including petitioners' and TVA's plants,

under § 7411(d). *See* TVA Br. 29. Although EPA announced in 2006 that it did not have authority to issue performance standards for greenhouse gases, 71 Fed. Reg. 9866, 9869 (Feb. 27, 2006), it is currently reconsidering that determination pursuant to a remand from the United States Court of Appeals for the D.C. Circuit directing it to do so in light of *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (holding that EPA has authority to regulate greenhouse-gas emissions from motor vehicles). *See New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 24, 2007).

Although no action has yet been taken limiting emissions from existing sources, including petitioners' and TVA's plants, under § 7411(d), respondents do not dispute that, once such action has been taken, their claims for injunctive relief under federal common law would be displaced under *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*).

REASONS FOR DENYING THE PETITION

As TVA emphasizes, “[k]ey features of this case counsel against plenary review by this Court at this time.” TVA Br. 9. First, this case does not implicate a conflict among the courts of appeals. The Second Circuit is the only appellate court that has addressed the particular issues at hand. There is, at most, a conflict between the Second Circuit’s decision and the decisions of three district courts. That kind of conflict does not typically warrant this Court’s review and certainly does not warrant its review here since two of the decisions were in a circuit where an appeal of one is pending, and the third was an oral ruling. And, contrary to petitioners’

predictions of widespread litigation involving greenhouse-gas emissions under federal common law, the only pending suit they identify is the district court case currently on appeal. *Native Village of Kivalina*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.).

Second, the displacement questions that petitioners and TVA raise may be affected by forthcoming EPA regulation of greenhouse gases under the Clean Air Act. Petitioners ask the Court to consider whether the Clean Air Act by itself, without any implementing regulations, displaces respondents' federal-common-law claims. It would be imprudent for the Court to decide that issue at this time because, as TVA makes clear, TVA Br. 29, EPA is currently considering whether to take regulatory action that would trigger control of greenhouse-gas emissions from petitioners' existing stationary sources. Such action would, at the very least, have a significant effect on the displacement issue and might even resolve it because, as respondents concede, EPA regulation of greenhouse-gas emissions from existing power plants would displace their federal-common-law nuisance cause of action for injunctive relief.

Third, the current procedural posture of the case makes it inappropriate for the Court to review the Article III standing question raised by petitioners. The case is in an interlocutory posture which, as TVA acknowledges, "is itself often a sufficient reason to deny certiorari." TVA Br. 9 (citing *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of certiorari)). Indeed, the court of appeals itself made it clear that further development of the facts

and intervening regulatory developments could affect the threshold rulings made in its decision. Petitioners ask the Court to consider whether respondents' injuries are traceable to petitioners' emissions and redressable by a favorable decision. That argument effectively seeks to challenge the truth of the allegations in the complaint, and accordingly requires an evidentiary record that has not yet been developed.

Fourth, petitioners' political question argument depends on speculation about what remedy the district court might fashion. In the case's current interlocutory posture, any arguments about the nature of the remedy or the impact the remedy might have on petitioners or *amici* are premature and cannot be the subject of meaningful review by this Court.

TVA agrees that plenary review of the case by this Court is unwarranted at this time, and further does not challenge the court of appeals' disposition of several key issues. For example, TVA dismisses the relevance of the political question and Article III standing arguments—two of the principal bases of the petition—suggesting instead that “[a]s a legal matter, petitioners’ concerns are best expressed as defects in demonstrating prudential standing.” TVA Br. 11; *id.* at 18 n.10 (“[W]idely shared environmental harms may establish injury for Article III purposes.”). Nor does TVA argue that the Second Circuit analyzed the displacement issue incorrectly in light of the then-existing state of EPA regulation of greenhouse gases. Rather, TVA says that those “predicates” for the Second Circuit’s decision “are no longer true” and urges reconsideration of the displacement question in light of EPA’s actions “[i]n the

11 months since the court issued its decision.” TVA Br. 23. TVA argues that the Court should vacate the decision of the court of appeals and remand the case for consideration of EPA’s recent regulatory actions—none of which limit carbon-dioxide emissions from existing power plants—and respondents’ prudential standing. But, as TVA concedes, these arguments were not raised to either of the courts below, either before or after the decision under review. Nor is a vacatur required for the arguments to be asserted before the courts below. Because the court of appeals’ order remands the case to the district court, TVA will have an opportunity to raise those questions on remand. And prudential standing—which TVA raises for the first time in this Court—is not an intervening development justifying a remand.

I. There Is No Conflict Warranting This Court’s Review At This Time.

1. As TVA observes, “the courts of appeals are not, at present, in conflict on the questions presented.” TVA Br. 9. Petitioners claim that there are “demonstrable conflicts” between the Second Circuit’s decision and other decisions, Pet. 12, but the decisions to which they refer are district court decisions and, in any event, of particularly limited precedential value. *Native Village of Kivalina*, 663 F. Supp. 2d 863, is on appeal. *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal voluntarily dismissed*, No. 07-16908 (June 24, 2009), was unpublished, and California voluntarily dismissed its appeal. In *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh’g en banc*,

598 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (2010), *petition for mandamus filed*, No. 10-294, the district court's oral ruling was originally reversed by a panel of the Fifth Circuit and then reinstated only after the *en banc* court vacated the panel decision for rehearing and subsequently dismissed the appeal when it lost the *en banc* quorum as a result of recusals. None of those rulings creates the kind of conflict with the Second Circuit's decision justifying resolution by this Court.

2. Nor, contrary to the assertions of petitioners and TVA, Pet. 5; TVA Br. 14-15, is there a spate of litigation making this Court's immediate review of this case necessary despite the absence of a conflict among the circuits. The only pending federal-common-law climate-change case cited by petitioners and TVA is *Native Village of Kivalina*. Although TVA predicts that the Second Circuit's decision in this case will induce plaintiffs in climate-change suits to file in the Second Circuit, thereby forestalling percolation in other circuits, TVA Br. 10, neither petitioners nor TVA have identified a single case that has been filed in the Second Circuit—or in any other circuit for that matter—since the Second Circuit ruled more than a year ago.

Amici curiae's predictions of widespread litigation are also unsubstantiated. *Amici* State of Indiana *et al.* express concern that the decision of the court of appeals makes lawsuits against States likely, *see* Brief of the States of Indiana *et al.* as *Amici Curiae* in Support of the Petition ("Indiana Br.") 20-22, but they fail to identify even a single lawsuit that has been filed against a State. Even more unfounded are *amici* automobile manufacturers' concerns about federal-common-law

challenges to emissions from motor vehicles. *See* Brief of the Association of International Automobile Manufacturers *et al.* as *Amici Curiae* in Support of Petitioners (“AIAM Br.”) 2-3, 14. EPA has issued emission limitations for light-duty motor vehicles, thus displacing federal-common-law claims as to those emissions, and has proposed limitations for medium and heavy-duty trucks, *see* U.S. EPA, EPA and NHTSA Propose First-Ever Program to Reduce Greenhouse Gas Emissions and Improve Fuel Efficiency of Medium- and Heavy-Duty Vehicles: Regulatory Announcement (Oct. 25, 2010).³

Contrary to the dire predictions of petitioners, TVA, and *amici*—including the implausible specter of lawsuits claiming that human beings create a public nuisance by exhaling carbon dioxide, Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America in Support of Petitioners 5—greenhouse-gas emission claims under federal common law are decidedly uncommon and are at such an early stage of percolation in the federal courts that they do not warrant this Court’s review at this time.

II. The Court Should Not Decide the Statutory Displacement Issue At This Time Due to the Current Regulatory Flux.

1. The Court’s review is also improper because the quickly shifting regulatory landscape may eliminate any dispute between the parties on displacement and, indeed, on any of the questions presented. Petitioners—

3. *Available at* <http://www.epa.gov/otaq/climate/regulations/420f10901.htm>.

but not TVA, *see* TVA Br. 24—argue that the Clean Air Act itself displaces respondents’ claims, even in the absence of any regulatory action by EPA. Pet. 21-22. But it would be imprudent for the Court to consider that question at this time because EPA is actively considering whether to issue performance standards limiting greenhouse-gas emissions from new and modified power plants, which would require States or EPA to limit greenhouse-gas emissions from existing power plants. 42 U.S.C. § 7411(b), (d). If and when carbon-dioxide emissions from petitioners’ existing plants are limited, respondents agree that their request for emission reductions under federal common law would be displaced, obviating any need for review not only of displacement but also of the other questions presented. Nor do petitioners identify any other area of the law that would be aided by the Court’s review of the displacement question as presented here. Indeed, that question is essentially *sui generis*.

2. Moreover, petitioners are participating in a broad set of industry challenges to EPA’s recent greenhouse-gas rulemakings. See p. 4 *supra*. If petitioners successfully block those regulations, it would place the displacement question in a very different light, making it imprudent for this Court to consider this case in its current form.

3. In any event, the court of appeals’ ruling that the Clean Air Act does not displace respondents’ federal-common-law claims in the absence of any regulatory action by EPA was based on well-settled law, as established in *Illinois v. City of Milwaukee*, 406 U.S. 91, 104-08 (1972) (*Milwaukee I*), and *Milwaukee II*, 451

U.S. at 317-20. In *Milwaukee I*, the Court held that Illinois' federal-common-law challenge to Milwaukee's discharges of sewage into Lake Michigan was "not inconsistent with" the pre-1972 Federal Water Pollution Control Act and thus not displaced. *Id.* at 102-04. That version of the Federal Water Pollution Control Act required the States—or, if they failed to do so, EPA—to establish water-quality standards, but did not require limits on Milwaukee's discharges or provide any remedy to Illinois unless and until EPA determined that the discharges endangered human health or welfare and sought to abate it. *Id.*

The Court heard the case again after Congress amended the Federal Water Pollution Control Act (now called the Clean Water Act) to prohibit *every* discharge of water pollutants except as authorized by a permit. Under the new regime, Milwaukee could not discharge sewage except subject to limitations established by a permit issued under the Act. *Milwaukee II*, 451 U.S. at 319-20. As a result, Illinois' federal-common-law claims regarding the discharges "ha[d] been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress," and thus displaced. *Id.* at 318.

The Clean Air Act, like the pre-1972 Federal Water Pollution Control Act reviewed in *Milwaukee I*, does not itself prohibit or limit emissions of air pollutants, including carbon dioxide, unless and until EPA takes regulatory action to control emissions. At the time that the court of appeals issued its decision here, EPA had issued no greenhouse-gas limitations on any source of greenhouse gases, much less limited petitioners'

discharges as it had in *Milwaukee II*. As a result, the court of appeals ruled correctly that the Clean Air Act itself did not displace respondents' federal-common-law claims. Nor, contrary to petitioners' suggestion, *see* Pet. 22-23, is there a conflict between that ruling and *Mattoon v. City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992), which involved a different federal statute, the Safe Drinking Water Act, 42 U.S.C. §§ 300f *et seq.*, and an entirely intrastate water pollution issue—the presence of bacteria in a local reservoir—not generally cognizable under federal common law. The case was eventually re-filed and resolved in state court under state law. *See Mattoon v. City of Pittsfield*, 775 N.E.2d 770 (Mass. App. Ct. 2002).

4. Petitioners—but not TVA—also ask the Court to consider whether federal common law encompasses public-nuisance claims seeking injunctive relief for emissions that contribute to climate change. Again, there is no reason for the Court to consider that question at this time because that federal-common-law remedy may be displaced in the foreseeable future. In any event, the question is not an unsettled one requiring the Court's resolution. Petitioners frame the issue as whether “[t]o imply a new common law cause of action to address climate change.” Pet. 24 (emphasis added). But the cause of action is not a *new* one. *Milwaukee I*, 406 U.S. at 103, made it clear that a long line of cases, including *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907), and *Missouri v. Illinois*, 180 U.S. 208, 241 (1901), had established an interstate-pollution public-nuisance claim under federal common law. As *Milwaukee I* stated, “[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common

law.” 406 U.S. at 103; *accord Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 n.13 (1981); *Arkansas v. Oklahoma*, 503 U.S. 91, 98-101, 110 (1992). Petitioners further suggest that the federal common law of nuisance was developed at a time when “the Constitution was thought to preclude any branch of government other than the judiciary from addressing interstate pollution,” thus making it no longer viable, Pet. 24, but, as discussed above, *Milwaukee I* was decided *after* Congress had enacted the original version of the Federal Water Pollution Control Act.

Nor is the federal common law of nuisance limited, as petitioners claim, Pet. 25, to “simple type” nuisances. Petitioners’ argument mistakenly construes *North Dakota v. Minnesota*, 263 U.S. 365, 372 (1923), where the Court stated that interstate flooding of land was “a public nuisance of simple type for which a state may properly ask an injunction” directly from the Court. *Id.* at 374. *North Dakota* did not hold that only “simple” nuisances are cognizable under federal common law, and in that case itself, the Court engaged in an in-depth review of complex expert testimony. *Id.* at 379-87.

Indeed, from its inception, federal nuisance law has involved complex nuisances. For example, when the Court decided the merits of Missouri’s federal-common-law challenge to the discharge of sewage into the Mississippi watershed by Illinois in *Missouri v. Illinois*, 200 U.S. 496, 518, 522 (1906), the Court observed that “the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science,” and emphasized that the case did *not* involve

“a nuisance of the simple kind that was known to the older common law.”

Petitioners also argue that federal common law is limited to “noxious or harmful substances that caused severe, localized harms directly traceable to an out-of-state source,” Pet. 24-25, but as the court of appeals held, there is “no case law” supporting that argument, Pet. App. 91a. And, in any event, petitioners’ contention is essentially an argument that respondents have failed to allege injuries traceable to petitioners’ emissions, as required for Article III standing, which is discussed below.

Nor is there any basis for petitioners’ fear that the courts will establish standards that conflict with regulations issued by EPA. Pet. 20. That will not happen, because once EPA issues regulations that would create that kind of conflict, any contrary standards established under federal common law would be displaced.

III. Respondents’ Standing Under Article III Does Not Warrant the Court’s Review At This Time Because There Has Not Been Any Factual Development.

1. The Court should also decline to consider respondents’ Article III standing at this juncture because the matter is still at the pleading stage and the standing issues raised by petitioners will require an evidentiary record to resolve. As the court of appeals observed, “the procedural posture of a case is important when assessing standing.” Pet. App. 42a. At the pleading stage, a case is subject to dismissal for lack of standing

only if, accepting the allegations in the complaint as true and construing them in favor of the plaintiffs, the plaintiffs would not have standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). But petitioners' argument does not accept respondents' allegations as true. Instead, they contend that respondents will not be able to prove their allegations showing that, as required under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), their injuries are traceable to petitioners' plants and redressable by a favorable decision. Those are factual contentions that can be resolved only on a motion for summary judgment or at trial. If the Court declines review at this juncture, petitioners are free, as the defendants did in *Lujan*, 504 U.S. at 561, to seek summary judgment on standing, which would require respondents to set forth specific facts, provide petitioners an opportunity to submit their own facts, and establish an informed basis on which to decide standing. The Court should await that evidentiary development rather than engage in a premature review of standing that would leave key questions unresolved.

2. Two sets of requirements govern respondents' standing, and respondents' allegations satisfy both of them. First, to establish Article III standing, a plaintiff must generally show (1) an injury that is (2) fairly traceable to the defendant's actions and (3) will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. Second, a State may sue in its *parens patriae* capacity based on a quasi-sovereign interest that is "apart from the interests of particular private parties" and involves "a sufficiently substantial segment of its population." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603 (1982); *see also* Pet. App. 48a.

The court of appeals held that all the respondents meet the *Lujan* test, and that the respondent States meet the *Snapp* test. *Id.* at 54a-76a. Petitioners do not contest the court’s ruling under *Snapp*, or that respondents’ alleged injuries are sufficient under *Lujan*, but contend that respondents’ allegations fail to meet *Lujan*’s traceability and redressability requirements. The Court cannot fully review those contentions without an evidentiary record.

Respondents have alleged that (1) they have suffered or will suffer a wide range of injuries from climate change, including erosion of coastal land as a result of a rise in sea levels, decreased access to fresh water as a result of lost snowpack, and increased injuries and death due to intensified heat waves; (2) petitioners and TVA—the five largest sources of carbon dioxide in the United States and among the largest in the world, emitting 650 million tons of carbon dioxide annually—have contributed to climate change; and (3) climate-change related injuries will be reduced if petitioners and TVA reduce their emissions. *See id.* at 8a-11a, 68a, 173a. Those allegations, which must be accepted as true at this stage, establish that respondents’ injuries are traceable to petitioners’ and TVA’s carbon-dioxide emissions and will be redressed by a reduction in those emissions.

Petitioners contend that “[c]limate change is not traceable to any of these defendants, and would not be redressed by the imposition of carbon dioxide emissions caps on them.” Pet. 13. But the complaint alleges that “emissions of carbon dioxide contribute to global warming and to the resulting injuries and threatened

injuries to the plaintiffs, their citizens and residents, and their environment” and that “[r]eductions in the carbon dioxide emissions of the defendants will contribute to a reduction in the risk and threat of injury to the plaintiffs and their citizens and residents from global warming.” Compl. ¶¶ 148, 157, No. 04-5669 (July 21, 2004). Petitioners’ contrary contentions are factual, at least in part, and at this stage of the litigation there is as yet no factual record. *See* TVA Br. 21 n.12 (contending that respondents will need to produce evidence showing that petitioners’ emissions will reduce the magnitude of respondents’ injuries).

To the extent that petitioners are, in effect, asking the Court to take judicial notice that a reduction in carbon-dioxide emissions from their plants would have *no* impact on respondents’ injuries, that would be inconsistent with *Massachusetts*. In that case, EPA argued, based on a factual record, that the plaintiffs lacked standing because EPA’s decision not to regulate motor-vehicle greenhouse-gas emissions made only an insignificant contribution to the plaintiffs’ injuries. 549 U.S. at 523. Indeed, EPA made an argument strikingly similar to petitioners’, “maintain[ing] that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle.” *Id.* at 517. The Court disagreed after reviewing evidence that showed, among other things, that the United States transportation sector emitted 1.7 billion metric tons of carbon-dioxide annually, *id.* at 524—a level comparable to the 650 million tons of annual emissions that respondents allege here, Pet. App. 173a—and ruled that “[w]hile it may be true that regulating motor-vehicle emissions will not by itself

reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.” *Id.* at 524-25 (emphasis in original).

Petitioners mistakenly argue that the standing analysis in *Massachusetts* is irrelevant here because that case involved a petition challenging EPA’s failure to regulate rather than a federal-common-law claim. Pet. 16. But *Lujan* makes it clear that standing is not harder to establish in a case directly against a tortfeasor, such as this one, than in a case against a regulator, such as *Massachusetts*. See 504 U.S. at 562. Furthermore, *Massachusetts* held that the petitioners’ assertions had “satisfied the most demanding standards of the adversarial process.” 549 U.S. at 521. In any event, regardless of whether *Massachusetts* controls the outcome here, it counsels strongly in favor of the Court’s waiting to consider respondents’ standing until it can review a factual record, as it did there.

Petitioners also argue that the decision of the court of appeals is “plainly inconsistent” with the Third Circuit’s decision in *Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), and with two decisions from other circuits relying on it, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000), and *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996). Pet. 18. But far from disagreeing with this line of decisions, the Second Circuit took into account this “widely accepted case law,” which is consistent with the long-established principle that a defendant can be held liable for contributing to a

common-law nuisance, *see Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001). Pet. App. 69a-72a. Petitioners argue that the court of appeals should not have relied in any way on the standing analysis in *Powell Duffryn* and its progeny because those cases involved violations of permits issued under the Clean Water Act, and this case does not involve a statutory permitting process. Pet. 18-20. But there is no dispute among the circuits as to the underlying common-law causal principle, and the court of appeals cannot be faulted for examining a line of cases in an analogous statutory context. As this Court has recognized, standing must be “gauged by the specific common-law, statutory or constitutional claims that a party presents,” *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 76 (1991), and the court of appeals properly did so here.

IV. Petitioners’ Political Question Argument Is Based on Premature Speculation About the Remedy.

1. Petitioners—but again, not TVA—also ask the Court to consider whether respondents’ federal-common-law claims raise non-justiciable political questions. That issue does not warrant this Court’s review. This case falls into none of the categories—particularly foreign relations and constitutional questions—where the Court has typically found political questions. *See Baker*, 369 U.S. at 208-17. Instead, petitioners ask the Court to rule that the unique attributes of greenhouse-gas emissions raise political questions. Pet. 28. It would be premature for the Court to weigh in on that issue at this time in the absence of a

circuit split, or even sufficient percolation in the lower courts. The only two courts of appeals that have addressed the issue—the Second Circuit in this case and the now-vacated Fifth Circuit panel opinion in *Comer*—both concluded that there was no political question, and the issue is currently pending before the Ninth Circuit in *Native Village of Kivalina*.

2. The interlocutory posture of this case also counsels against this Court’s review of the political question issue at this time. Although petitioners asserted in the district court that the *Baker v. Carr* test for political questions is irrelevant to this case, see p. 2 *supra*, they now rely on that test, arguing that respondents’ claims cannot be resolved using “judicially discoverable and manageable standards,” and instead require “an initial policy determination of a kind clearly for nonjudicial discretion,” *Baker*, 369 U.S. at 217. Pet. 26. But petitioners’ political question arguments rest on speculation about how the district court *might* fashion a remedy, speculating that the court would need to establish global emission levels, nation-by-nation levels, and industry-by-industry levels before proceeding finally to establish carbon-dioxide emission levels for petitioners’ plants. Pet. 28. There is no way for petitioners—or, for that matter, respondents—to predict the nature of any remedy the district court might fashion. As a result, it would be premature for the Court to consider whether deciding relief will require the district court to make policy determinations that a court should not make.

Nor can petitioners make informed predictions about how any eventual remedy might affect them.

Without knowing what relief the court will order, they have no basis for claiming that that relief will threaten their financial health and security, or that of other sectors of the economy, or that they may have to shut down their facilities. Pet. 2, 4. Nor is there any basis for the electric industry *amici* to predict that the emission reductions imposed by the court would be “vastly more expensive” than reductions imposed by EPA, *see* Brief for the Edison Electric Institute *et al.* as Amici Curiae in Support of Petitioners 19-20, or for the *amici* States of Indiana *et al.* to predict that the remedy would cause the court to lose credibility and stature, *see* Indiana Br. 5. These speculative predictions are particularly dubious given that, as petitioners acknowledge, Pet. 3, the district court will be guided by long-established principles of tort law regarding the fashioning of injunctive relief that require it to order relief that is reasonable, taking into account the burden of such relief on petitioners.

Because—as petitioners themselves frame the issue—the question whether respondents have raised political questions turns on how a remedy would be fashioned, the case does not warrant this Court’s review in its current posture. *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007) (“[i]t would be inappropriate to dismiss the case on the mere chance that a political question may eventually present itself”); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 929 (2d Cir. 1968) (rejecting a political question argument because “[w]ith this case only at the pleadings stage, we do not think that we should speculate on what specific remedies might be appropriate if the plaintiffs’ allegations are proved”);

cf. Va. Military Inst., 508 U.S. at 946 (denying certiorari because the lower court had not yet had an opportunity to determine an appropriate remedy).

3. Petitioners argue that the Court should decide the issue now in order to avoid a “confused patchwork of standards, to the detriment of industry and the environment alike,” quoting the Fourth Circuit’s ruling in *North Carolina v. TVA*, No. 09-1623, 2010 WL 2891572, at *1 (4th Cir. July 26, 2010).⁴ Pet. 32. But federal common law provides a uniform standard and was fashioned for that very reason, preventing the conflicting standards that petitioners predict. *See Milwaukee II*, 406 U.S. 91, 105 n.6. Although there is a theoretical possibility that different federal courts would impose different injunctive relief under federal common law, there is little risk that that will happen here if the Court declines to review this case before relief is ordered because, to respondents’ knowledge, this case is the only pending federal-common-law case seeking injunctive relief to reduce greenhouse-gas emissions.

Moreover, the Fourth Circuit case on which petitioners rely involved neither greenhouse gases nor federal common law. North Carolina challenged emissions by TVA of pollutants that have been regulated by EPA for decades—sulfur dioxide and nitrous

4. Ironically, *amici* States of Indiana *et al.* support the petition for certiorari because they would like to impose their own standards, arguing that resolution of respondents’ claims under federal common law would prevent States from instituting different environmental policies reflecting their diversity. Indiana Br. 15. That is an argument *in favor* of a patchwork of standards.

oxides—under the common law of the States where the plants were located. The district court granted North Carolina’s request for an order directing TVA to install or maintain equipment designed to control the emissions. *See North Carolina v. TVA*, 593 F. Supp. 2d 812, 822-25, 829-31 (W.D.N.C. 2009). Even though the Clean Air Act’s savings clause expressly preserves state-common-law claims like North Carolina’s, 42 U.S.C. § 7604(e); *see Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 495-96 (1987) (interpreting the identical savings clause in the Clean Water Act to preserve a public-nuisance claim brought under the common law of the state where a pollution source is located), the Fourth Circuit reversed the district court on the ground, among others, that the Act preempts state-common-law claims. *North Carolina v. TVA*, 2010 WL 2891572 at *8-*10, *13-*14. Whether or not that holding is correct under *Ouellette*, the court’s concern that *state*-common-law claims could lead to different standards in different States has no application in this *federal*-common-law case. If anything, the prospect of varying standards under state common law bolsters the case for applying federal rather than state common law in this realm.

4. In any event, respondents’ claims do not raise political questions. The political question doctrine is “primarily a function of the separation of powers,” *Baker*, 369 U.S. at 210, “designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government,” *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). But respondents make claims under common law, which is the essence of the business of the judiciary, requiring it “to act in the manner traditional for English and

American courts.” *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion). As the court of appeals recognized, there is “a long line of federal common law of nuisance cases where federal courts employed familiar public nuisance precepts, grappled with complex scientific evidence, and resolved the issues presented, based on a fully developed record.” Pet. App. 30a-31a.

Petitioners argue that, because public-nuisance law requires the district court to weigh the gravity of the harm caused by petitioners’ carbon-dioxide emissions against the utility of their conduct in order to fashion a remedy, this case “involve[s] policy tradeoffs.” Pet. 27. But that policy tradeoff—if it can be called that—is a standard established by the courts themselves, not one committed to the other branches. It makes no sense to say that a judicially established standard cannot be applied by a court because it involves a determination that can be characterized as involving policy.

Petitioners’ argument fails to recognize that the political question doctrine prohibits only policy determinations of “a kind clearly for nonjudicial discretion.” *Baker*, 369 U.S. at 217. If weighing the equities to determine relief in a common-law case is indeed a policy determination, it is one long entrusted to the courts.

Nor does the fact that this case may arise in a politically sensitive context mean that it involves political questions. The Court made it clear in *Baker*, 369 U.S. at 217, that “[t]he doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’” *See also Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S.

221, 230 (1986) (a case does not present a political question merely because it has “significant political overtones”).

V. Because the Court of Appeals Remanded This Case to the District Court, TVA Does Not Need a Remand from This Court to Make Its Displacement or Prudential Standing Arguments.

1. TVA asks the Court to grant the writ of certiorari, vacate the decision of the court of appeals, and remand for consideration of whether the regulatory actions EPA has taken since the court of appeals issued its decision have displaced respondents’ federal-common-law claims and whether respondents meet prudential standing requirements. It is not clear that TVA may raise prudential standing for the first time in this Court, without having preserved the issue in the lower courts, and respondents do not concede that TVA can do so. In any event, there is no reason for the Court to remand the case to the court of appeals to consider the displacement and prudential standing issues TVA has raised because TVA will have the opportunity to raise those arguments below without a remand from this Court.

2. Unlike petitioners, TVA does not claim that the Clean Air Act by itself displaces respondents’ federal common law claims. Rather, TVA argues that the regulatory actions EPA has taken since the court of appeals issued its decision—including the motor-vehicle endangerment finding, light-duty motor-vehicle emission standards, and permitting requirements for

new and modified sources—create a “reasonable probability” of displacement, and therefore warrant a remand for consideration of that possibility. TVA Br. 32 (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1966) (per curiam)). But because this case is in an interlocutory posture, no action by this Court is required to give TVA the opportunity to argue to the courts below that respondents’ claims have been displaced by EPA’s recent regulatory actions. If the Court denies the writ of certiorari, the case will be remanded to the district court under the court of appeals’ order, TVA may then make its argument to the district court, the Second Circuit may consider it in due course, and TVA will have the opportunity to seek this Court’s review.

That approach is particularly warranted here because, as TVA itself emphasizes, TVA Br. 29, EPA’s regulation of greenhouse gases is currently in flux and there may soon be more regulatory action. The court of appeals’ remand to the district court will appropriately allow the district court to address future regulatory developments as they occur. Particularly given that respondents have acknowledged that regulatory action limiting carbon-dioxide emissions from existing power plants would, under *Milwaukee II*, 451 U.S. at 317-20, displace their federal-common-law remedy, and that may occur here in the foreseeable future, it would be imprudent to require the court of appeals to determine whether displacement has already occurred when such further regulatory action is anticipated.

3. Nor is TVA correct that EPA’s recent regulatory actions have displaced respondents’ federal-common-law claims for injunctive relief. TVA recognizes that EPA

has not yet regulated emissions from existing sources but argues nonetheless, quoting *Milwaukee II*, 451 U.S. at 324, that EPA's regulation of other sources has displaced respondents' claims because "[t]he question is whether the field has been occupied, not whether it has been occupied in a particular manner." TVA Br. 31. TVA quotes *Milwaukee II* out of context: the Court was responding to Illinois's argument that, even after a permit had been issued regulating Milwaukee's sewage overflows, Illinois could rely on federal common law to contest how effectively or adequately the overflows were being regulated. 451 U.S. at 323. Here, in contrast, respondents have brought their federal-common-law claims not because they disagree with how well EPA is regulating greenhouse-gas emissions from existing stationary sources, but in the absence of any EPA regulation of those emissions at all, as in *Milwaukee I*.

Indeed, the present state of regulatory flux is strikingly similar to that existing when *Milwaukee I* was decided in April 1972. At that time, Congress was in the process of amending the Federal Water Pollution Control Act to limit discharges from sewage treatment plants, and the Senate had already passed the amendments. See *Milwaukee II*, 451 U.S. at 310, 327 n.19. But because the discharges were not yet limited, there was no basis for the Court to conclude that Illinois' federal-common-law claims had been displaced. Likewise, respondents' federal-common-law claims will not be displaced until EPA actually limits greenhouse-gas emissions from petitioners' and TVA's plants.

4. Unlike petitioners, TVA does not contest whether respondents have Article III standing. Instead, TVA

argues that the concerns petitioners raise with respect to Article III standing and political questions “are best expressed as defects in demonstrating prudential standing,” TVA Br. 11, and seeks a remand requiring the court of appeals to consider that issue. Even if TVA can raise that issue for the first time here, as it concedes it is seeking to do, *id.* at 21, the Court should not vacate and remand for consideration of prudential standing.

First, TVA’s argument is incorrect. It contends that respondents do not have prudential standing because they raise “generalized grievances.” *Id.* at 17. But grievances shared by a substantial segment of the population are the *raison d’etre* of suits like this one that are brought by States in their *parens patriae* capacity. *See Snapp*, 458 U.S. at 607. Neither TVA nor petitioners challenge the court of appeals’ ruling that respondent States meet the *Snapp* test. Nor does TVA cite any decisions barring a State, on prudential standing grounds, from suing as *parens patriae* to protect the health and welfare of its citizens.

Second, because this petition is interlocutory, TVA may present its novel argument to the district court and, should the case be appealed again, by the court of appeals without a remand. It would be particularly unwarranted for the Court to vacate and remand for consideration of an argument that was raised for the first time in response to a petition for certiorari and that is not based on any intervening development. *See Lawrence*, 516 U.S. at 192 (Scalia, J., dissenting). When, as here, a party belatedly discovers a new argument, it should make that argument in due course under normal procedures, rather than seek to vacate a decision that

did not consider the argument because the party did not raise it.

CONCLUSION

The petition for writ of certiorari should be denied.

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